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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NO. 319

FIDELITY ASSURANCE ASSOCIATION, A Corporation, Debtor, and CENTRAL TRUST COMPANY, Trustee for Fidelity Assurance Association,

Petitioners,

vs.

EDGAR B. SIMS, Auditor of the State of West Virginia, and Ex Officio Insurance Commissioner of the State of West Virginia; ROSS B. THOMAS and H. ISAIAH SMITH, West Virginia State Court Receivers; BANKING COMMISSION OF WISCONSIN; CHAS. R. FISCHER, Commissioner of Insurance and Permanent Receiver for Debtor Corporation In and For The State of Iowa; JOHN B. GONTRUM, Insurance Commissioner of the State of Maryland; DEWEY S. GODFREY, Missouri State Court Receiver; L. H. BROOKS, Trustee, FREDERICK LEAKE and A. L. GOLDBERG, JR., Trustee; and SECURITIES AND EXCHANGE COMMISSION,

Respondents.

STATEMENT AMICUS CURIAE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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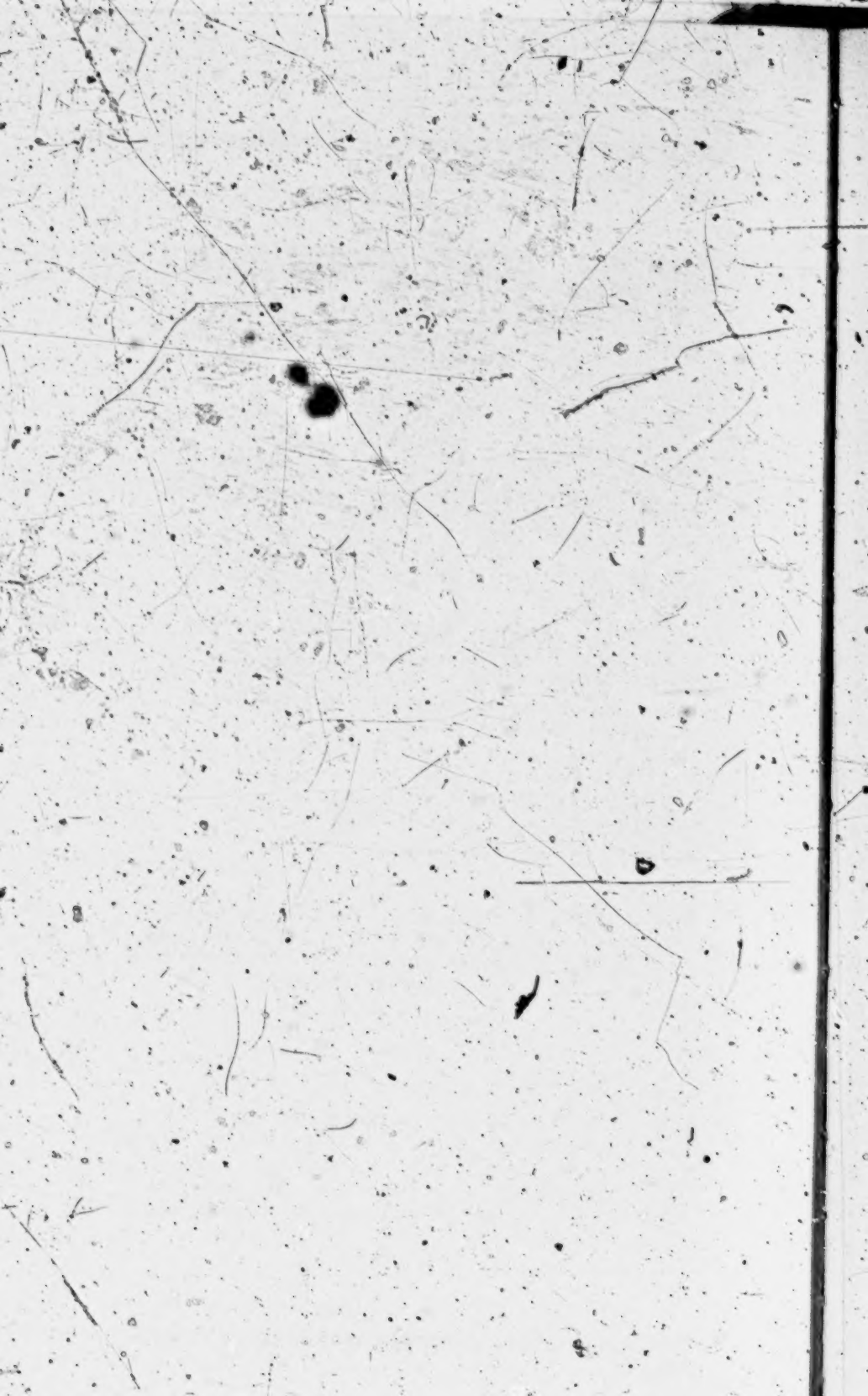

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STATEMENT AMICUS CURIAE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The undersigned representatives of the Legal Departments of their respective States are not parties to the appeal to the Circuit Court of Appeals in this case but, having a profound interest in the subject matter

thereof, we offer as amicus curiae these suggestions in opposition to the petition for certiorari.

Now come the undersigned and offer opposition to the petition of the Fidelity Assurance Association and Central Trust Company, who did petition this Court for the issuance of a writ of certiorari to the United States Circuit Court of Appeals of the Fourth Circuit to review a decision of that Court heretofore entered on the 16th day of June, 1942, and in which rehearing has been denied by that Court.

The opinion of the Circuit Court of Appeals sought to be reviewed by the petition herein reversed an order of the District Court for the Southern District of West Virginia, entered January 5, 1942, sustaining the petition for reorganization of the Fidelity Assurance Association under Chapter X of the Bankruptcy Act. The order of the District Court held that:

A. The Fidelity was not an insurance company as contemplated by the Bankruptcy Act. (Trans. p. 19).

B. The petition for reorganization was filed in good faith as required by the act. (Trans. p. 34).

And thereupon the trial court by its decree dismissed all petitions and opposition pleadings thereto and directed that securities held by other states be turned over

at once to its appointed trustee, and, summarily ordered each state officer having any such securities to immediately comply therewith.

The finding that the Fidelity was not an insurance company was made by the trial court before the record disclosed the abundant evidence which was later discovered by creditors. (Transcript of Record 339 and following). And it was stipulated by the Fidelity that its "*total number of Series B Contracts with insurance clause on December 31st, 1940, was 14,626.*" Trans. pp. 361, 362).

On the question of good faith the trial court reached the conclusion that the petition complied with the degree of good faith required by the Bankruptcy Act. Yet the District Judge in his opinion disclosed his grave doubt as to the good faith of the petition as well as his belief that nothing could be reasonably expected of the Fidelity but a so-called slow liquidation. Some of the expressions of the trial Judge which support the above statement are as follows:

> "It is extremely doubtful whether, in view of unsettled economic conditions and the critical international situation, the Fidelity plan would any longer appeal to a large public; but it is not impossible; and it is not the duty of the court to decide for the public that investors will not or should not buy these contracts in the future." (Trans. p. 28).

"It is not necessary that there be a reasonable prospect for the successful rehabilitation of the Debtor as a going or continuing corporation. It is sufficient if it is shown that the Debtor is in a position to conform to and obtain the benefits of the statute for a slow, beneficial and orderly liquidation." Trans. p. 30).

"The character of Debtor's asets is such that it would be peculiarly beneficial in its case to obtain slow and orderly liquidation, if such should be found to be the only feasible plan." (Trans. p. 31).

The Circuit Court of Appeals, after an examination of the record of the evidence in this case, unanimously found the Fidelity Assurance Association to be an insurance company; also found that the petition for reorganization was not filed in good faith, either in law as prescribed by Chapter X of the Bankruptcy Act, or in fact.

A brief summary of the policy or contract holders in States where securities have been deposited to protect the citizens under the several State statutes in their investments is as follows:

FIDELITY ASSURANCE ASSOCIATION SUMMARY

Deposits by States

as of June 6, 1941

	No. of Shares	Par Value	Book Value	Market Value
Alabama		29,500.00	30,962.76	32,555.16
Delaware		330,000.00	312,708.91	293,790.63
Illinois		4,275,000.00	3,934,572.87	3,759,894.00
Indiana		166,000.00	159,278.50	162,863.44
Iowa		42,000.00	39,975.90	45,082.50
Kansas		85,000.00	81,019.50	83,337.50
Kentucky		85,000.00	77,219.00	86,712.50
Maryland		600,000.00	571,998.80	470,806.25
Missouri		1,085,000.00	938,400.70	861,100.62
Ohio		488,000.00	487,786.10	509,573.44
Pennsylvania		211,000.00	213,866.96	232,591.57
Tennessee		195,000.00	193,120.62	196,574.38
Virginia		25,000.00	25,505.00	27,703.13
West Virginia	38,914 95/100	15,480,053.13	14,534,766.87	10,674,696.08
Wisconsin		2,499,000.00	2,532,457.91	2,619,399.07

Liabilities by States

as of April 10, 1941

	Net Reserve Liability	Net Cash Liability
Alabama	$ 32,267.31	$ 31,346.71
Delaware	300,074.88	290,175.36
Illinois	4,368,348.52	4,225,790.75
Indiana	398,336.17	386,173.45
Iowa	35,332.03	34,478.27
Kansas	111,530.90	108,784.89
Kentucky	95,376.98	92,690.42
Maryland	508,163.70	492,552.24
Missouri	807,263.78	786,988.86
Ohio	2,439,364.17	2,360,418.70
Pennsylvania	4,816,175.07	4,668,582.25
Tennessee	206,879.70	200,504.97
Virginia	572,585.25	557,809.19
West Virginia	7,121,651.33	6,896,398.88
Wisconsin	2,408,301.57	2,342,978.73

Deposits by States

Total Deposited	38,914 95/100	$25,595,553.13	$24,133,640.40	$20,056,680.27
Not Deposited Securities	190,677 50/100	548,264.80	1,337,807.97	556,467.51

Liabilities by States

Total Deposited		
Not Deposited Securities	$24,221,651.36	$23,475,668.67

Deposits by States

Total	229,592 45/100	26,143,817.93	$25,471,448.37	$20,613,147.78

Liabilities by States

Total	$24,221,651.36	$23,475,668.67

* Net Liability is determined by deducting loans made to Contract-owners.

Many of the other States are filing authorities upon the two principal questions involved in this case, viz.: (a) Was the petition of the Fidelity Assurance Association filed in good faith as defined in Chapter X of the Bankruptcy Act; (b) Is the Fidelity Assurance Association an insurance company as contemplated by the Bankruptcy Act.

We are, therefore, content, in order to avoid copious duplication, to offer brief suggestions to this Court in opposition to the petition in view of the fact that it is our sincere belief that a delay occasioned by a review in this case will not only consume the time of this Court

unnecessarily but must inevitably result in the approval of the opinion of the Circuit Court of Appeals as above stated, as well as considerable loss to both creditors and contract-holders of the Fidelity Assurance Association. Not only will it be detrimental, as above set forth, but will keep out of circulation more than $20,000,000.00 and which should at once be turned back to the many thousand contract-holders.

The statutory laws of the State of Illinois, which give adequate and speedy liquidation of distribution of funds and securities of insolvent insurance companies in Illinois are hereto attached marked Exhibit "A", and made a part of these proceedings.

The State of Illinois has similar laws by which to liquidate and distribute deposited assets in savings companies other than insurance companies.

Similarly the states of Ohio, Indiana and Kentucky have adequate laws for the liquidation and distribution of the funds and securities held for the use and benefit of the contract-holders in the respective States, whether the company be deemed an insurance company or a savings and investment company.

We do not dispute the right of Congress, through its Bankruptcy Act, to confer upon the several Federal District Courts the power of reorganization of corpora-

tions, even though its property may be located in many States and embraced with the license of contract-holders. Such proceedings, under the present statute, contemplate a reorganization desired by the creditors and contract-holders not for the sole benefit of the stockholders. The good faith required of a petition by Chapter X has been defined so many times in the authorities submitted by these proceedings that it is unnecessary to argue further that the debtor's original petition offers no benefit or advantage to its creditors. To this date no person has offered any financial guarantee to further its reorganization, and in the light of the record of facts shown in these proceedings it may be safely suggested that no financial aid or guarantees will ever be offered by anyone as an inducement to the creditors to sanction reorganization. The District Court's decree means nothing more than an indefinite term of liquidation with corresponding delays and losses to the policy or contract-holders. On the other hand, if the Circuit Court of Appeals' opinion shall prevail in this case many millions of dollars will find their way back to the many contract-holders and eventually find their way into the War Treasury. The sentiments of the trial court to save harmless so far as might be possible the home institution are commendable, and it may be said, to the credit of the trial judge, that the company concealed from him the fact of its activities

which classified it as an insurance company, and such facts did not become conclusively shown until a petition to remand was presented to the Circuit Court of Appeals setting forth the discovery of such evidence. (Trans. p. 339) resulting in the sitpulation as shown on transcript 361-362, where it appears that the Company admitted having written more than fourteen thousand policies.

Whether the Fidelity Assurance Association may be said to be an insurance company or some other kind of savings company, the fact remains that the States holding securities for the protection of their citizens in guarantee made to them by the surety company have laws adequate for speedy and prompt liquidation of such securities, which laws the policy or contract-holders relied upon when they joined the contract. There can, therefore, be no point to induce this Court to push aside the State laws of the several States and take away their securities and center the same in a so-called reorganization by liquidation.

We are aware that it is urged that such proceedings cannot come about except with the consent of the creditors. Sufficient answer to that statement is that the very reason Congress provided certain necessary conditions precedent to reorganization proceedings, the most important of them being that a petition should be filed in

good faith, that Congress realized that a debtor must take what he can get; also, that ingennous methods could be speedily manufactured and devised by which creditors may be high-pressured into "consenting" to something called reorganization.

The effect of force as against the State laws for liquidating the securities of insurance companies and other savings corporations deposited under their requirements can only result in hostility on the part of the several States against permitting non-resident corporations to transact business therein, and must eventually germinate into unwise restrictive laws on the part of the several States. The effect of the petition for certiorari, if allowed by this Court, means freezing of great quantities of assets at a time when the same are so badly needed for other purposes and can only operate for the benefit of the stockholders and to the detriment of everybody else.

We therefore respectfully submit that this petition for certiorari should be denied.

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EXHIBIT "A"

(ILLINOIS INSURANCE CODE)

Article XIII. Rehabilitation, Liquidation, Conservation and Dissolution of Companies

Sec. 187. Scope of article.] This article shall apply to every company which is doing or attempting to do, or which is representing that it is doing an insurance business in this State or which is in process of organization for the purpose of doing or attempting to do such business.

Sec. 188. Grounds for rehabilitation and liquidation of domestic company.] Whenever any domestic company

(a) is insolvent; or

* * * * * * * * *

(e) is found to be in such condition that its further transaction of business would be hazardous to its policyholders, or to its creditors, or to the public; or

* * * * * * * * *

(j) has commenced, or has attempted to commence, any voluntary liquidation or dissolution proceeding, or any proceeding to procure the appointment of a receiver, liquidator, rehabilitator, sequestrator, or similar officer for itself; or

(k) is a party, either plaintiff or defendant in any proceeding in which an application is made for the appointment of a receiver, custodian, liquidator, rehabilitator, sequestrator or similar officer for such company or its property, or a receiver, custodian, liquidator, rehabilitator, sequestrator or similar officer for such company or its property is appointed by any court, or such appointment is imminent; or

* * * * * * * * * *

(n) * * * * * * * * * *

then the Director shall report any such case to the Attorney General of this State whose duty it shall be to apply forthwith by petition on relation of the Director in the name of the People of the State of Illinois to the Circuit or Superior Court of the county in which the principal office of such company is located for an order directing such company, upon such notice as the Circuit or Superior Court may prescribe, to show cause why an order to rehabilitate or liquidate the company should not be entered as provided in this article, and for such other relief as the nature of the case and the interests of its policyholders, creditors, members, stockholders or the public may require. Such order to show cause and the service thereof as prescribed in this article shall constitute legal process in lieu of any other process otherwise provided by law.

SEC. 189. INJUNCTION.] The court shall have jurisdiction, at any time after the filing of the petition to issue an injunction restraining such company and its officers, agents, directors, employees and all other persons from transacting any company business or disposing of its property until the further order of the court. The court may issue such other injunctions or enter such other orders as may be deemed necessary to prevent interference with the proceedings, or with the Director's possession and control or title, rights or interests as herein provided or to prevent interference with the conduct of the business by the Director, and may issue such other injunctions or enter such other orders as may be deemed necessary to prevent waste of assets or the obtaining of preferences, judgments, attachments or other like liens or the making of any levy against such company or its property and assets while in the possession and control of the Director.

* * * * * * * * *

SEC. 193. DUTIES OF DIRECTOR AS LIQUIDATOR—SALES—NOTICE TO CREDITORS—REINSURANCE.] (1) Upon the entry of an order directing liquidation, the Director shall immediately proceed to liquidate the property, business and affairs of the company. He is hereby authorized to deal with the property and business of the company in

his name as Director, or, if the court shall so order, in the name of the company.

(2) He may, subject to the approval of the court, sell or otherwise dispose of the real and personal property, or any part thereof, and sell or compromise all doubtful or uncollectible debts or claims owing to the company including claims based upon an assessment levied against a member or a subscriber of any company issuing assessable policies.

(3) He shall as soon as may be conveniently possible, give notice to all creditors who may have claims against the company, as revealed by the records of the company, to present the same.

(4) In order to preserve so far as possible the rights and interests of the policyholders of the company whose contracts were cancelled by the liquidation order and of such other creditors as may be possible, the Director may solicit a contract or contracts whereby a solvent company or companies will agree to assume in whole, or in part, or upon a modified basis, the liabilities owing to said former policyholders or creditors. If, after a full hearing upon a petition filed by the Director, the court shall find that the Director endeavored to obtain the best contract for the benefit of said parties in interest, and if the said Director shall report to the court that he is ready

and willing to enter into a contract and submit a copy thereof to the court, the court shall examine the procedure and acts of the Director, and if the court shall find that the best possible contract in the interests of said parties has been obtained and that it is best for the interests of said parties that said contract be entered into, the court shall by written order approve the acts of the Director and authorize him to execute said contract.

* * * * * * * * *

SEC. 197. GROUNDS FOR CONSERVATION OF ASSETS OF FOREIGN OR ALIEN COMPANY.] (1) Whenever any of the grounds for rehabilitation or liquidation of domestic companies specified in clauses (a), (b), (c), (d), (e), (f), (g), (j), (k) and (n) of Section 188, arise or exist with reference to any foreign or alien company authorized to transact the business of insurance in this State and having assets in this State, the Director may proceed for the filing of a petition as provided in this article against domestic companies, for an order directing such foreign or alien company to show cause why the Director should not take possession of its assets in this State and conserve such assets for the benefit of its creditors and for such other relief as the nature of the cause and the interests of its policyholders, creditors, members, stockholders or the public may require.

(2) The court shall have jurisdiction to issue injunctions and to enter such other orders as it may deem necessary as is provided in the case of a petition against a domestic company so far as such injunctions or orders may apply to such foreign or alien company. If the court finds that sufficient cause for conservation exists, it shall direct the Director to take possession of the property, business and affairs of the company and to conserve the same.

(3) Upon the entry of such order, the Director shall forthwith take possession of the property, business and affairs of such foreign or alien company, and conserve the same. He shall retain such possession until, on the petition either of the Director by the Attorney General, or of such foreign or alien company, or its receiver or anyone in charge of the property, business and affairs of such foreign or alien company in its domiciliary state or country, the court, after a full hearing, shall find that the ground for such order finding cause for conservation has been removed.

(4) The rights, powers and duties of the Director as such conservator, with reference to the assets of a foreign or alien company shall be ancillary to the rights, powers and duties imposed upon any receiver or other person, if any, in charge of the property, business and affairs of such company in its domiciliary state or country.

APPENDIX B.

The laws of the State of Ohio require companies of the type of Fidelity Assurance Association which do business in that state to make deposits for the benefit and protection of contract holders resident of Ohio. See Sections 698, 699 and 699-1, General Code of Ohio, contained in Appendix B hereof. Ohio has also provided by statute for the liquidation and distribution of such deposits in the event the depositing company fails to carry out its contract. See Section 641, General Code of Ohio, also quoted in Appendix B.

SECTION 641, GENERAL CODE OF OHIO.

If any company, corporation, or association required by law to make a deposit with the superintendent of insurance, or other state officer, to secure the contracts of such company, corporation, or association, or for any other purpose, fails to pay any of its liabilities upon such contracts, or other obligations, according to the terms thereof after the liability thereon has been determined, or if such company, corporation, or association, having ceased to do business within this state, leaves unpaid any such liability or has become insolvent, the attorney general of the state, on behalf of the superintendent of insurance, or such other officer, and upon the application of any person entitled to participate in such deposit, or

the proceeds arising therefrom, shall commence a civil action in the court of common pleas of Franklin county, making the company, corporation, or association, a party defendant, to determine the rights of all parties claiming any interest in such deposit, to subject the deposit to the payment or satisfaction of all liabilities and to distribute such fund among the persons entitled thereto.

SECTION 698, GENERAL CODE OF OHIO.

Before doing business in this state, every bond investment company shall deposit with the treasurer of state one hundred thousand dollars in cash or bonds of the United States or of the state of Ohio, or of any county or municipal corporation in Ohio, for the protection of investors in the securities of such company. Such deposit shall be made out of the paid-up capital stock of such bond investment company.

SECTION 699, GENERAL CODE OF OHIO.

The deposit made by a bond investment company with the treasurer of state shall be held as security for all claims of residents of this state against such company, and shall be liable for all judgments and decrees thereon, and subject to the payment of such decrees in the same manner as the property of other non-residents. If such company ceases to do business in this state, the treasurer of state may release securities, in his discretion, retaining sufficient to satisfy all outstanding liabilities.

SECTION 699-1, GENERAL CODE OF OHIO.

In addition to the deposits mentioned in the next two preceding sections, each such company, except those domiciled and holding certificates of authority in this state at the effective date of this act, shall deposit with the supervisor of bond investment companies, securities or assets of the kind and character permitted to be invested in by domestic life insurance companies under the laws of the state of Ohio, in an amount equal to the cash surrender value as defined in such contracts on all contracts entered into on and after the effective date of this act by such companies with persons resident in the state of Ohio, and such bond investment companies are hereby required to maintain such deposits in such amounts as are equal to such contract liabilities.

Before receiving a certificate of authority to do business in this state for the year beginning March 1, 1940, and each year thereafter, each such company, except those domiciled in this state and holding a certificate of authority at the effective date of this act, shall deposit with the supervisor of bond investment companies securities or assets of the kind and character permitted to be invested in by domestic life insurance companies under the laws of the state of Ohio, in an amount equal to the cash surrender value on all contracts entered into prior to the

effective date of this act by such companies with persons resident in the state of Ohio, and such companies are hereby required to maintain such deposits in such amounts as are equal to the contract liabilities.

All contracts or applications or subscriptions therefor entered into within the state of Ohio subsequent to March 1, 1940, by any foreign bond investment company holding a certificate of authority under the bond investment act shall contain a statement to the effect that the company maintains a deposit equal in amount to the cash surrender value as defined in said contracts in securities or assets of the kind or character permitted to be invested in by domestic life insurance companies under the laws of the state of Ohio, which deposit is segregated for the protection of contract holders resident in the state of Ohio.

All deposits required under this section shall be held by the supervisor of bond investment companies for the protection and benefit of their contract holders who are residents of Ohio.

If such company ceases to do business in this state, the supervisor of bond investment companies may release such securities or assets, in his discretion, retaining sufficient securities or assets to satisfy all outstanding contractual liabilities to persons resident of this state.

All securities or assets deposited with the supervisor of bond investment companies, hereunder, shall be deposited by said supervisor with the treasurer of state of the state of Ohio or with any federal reserve member bank or trust company approved by the supervisor of bond investment companies having a capital of not less than $1,000,000, the fees for such deposit to be paid by said bond investment company. The treasurer of state or such bank shall not deliver such securities or coupons attached thereto or assets except upon the written order of the supervisor of bond investment companies.